where Sutherland J. took the view that the application for mandamus should be refused owing to the long delay.

We can see no good reason in giving the word "suit" in "the Act" the restricted meaning which has been advanced. The fact that the word may be construed differently under a different legal system does not necessarily mean that we are not justified in giving the same word a different meaning in the light of local circumstances and development peculiar to our own legal system. As Bankes L.J. said in *Rex* v. *Port of London Authority, ex-parte Kynoch Ltd.* at page 183:

"Every case must depend on its own particular circumstances; but decided cases furnish some rules which ought to govern the Court in the exercise of its discretion to grant or refuse the prerogative writ of mandamus. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal . . . . "

There were clearly irregularities in the acquisition. The position was stated lucidly by the late Ong J., as he then was. Suffice for us to say that in the circumstances mandamus could not be issued. However, we consider the learned Judge was right to refuse leave not only because it is within "the Act" but also because the appellant has not exhausted his right of appeal against the decision of the High Court in declining to act.

The issue of an order of mandamus is strictly a matter of discretion. In order to ascertain whether it is proper or not to grant the remedy the court is entitled to take into consideration not only the conduct of the applicant but also all the surrounding circumstances of the case. The procedure of the court cannot be abused as there must be an end to any litigation.

Accordingly, we would dismiss the appeal with costs both here and the court below. The deposit is to be paid to the respondent on account of taxed costs.

*Appeal dismissed.*

Solicitors: *Chooi & Company.*

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## NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS v. HOTEL MALAYA SDN. BHD.

[A.C.J. (Wan Hamzah S.C.J.) October 11, 1985]

[Kuala Lumpur – Civil Appeal No. 35 of 1983]

*Trade Union – Strike – Whether strike legal – Collective agreement – Whether there should be one single agreement or two separate agreements – Whether employment validly terminated – Whether there is a trade dispute.*

*Industrial Relations – Collective agreement – Whether there should be single or separate agreements – Whether employment validly terminated – Whether there is a trade dispute – Industrial Relations Act, 1967, ss. 2, 26(2), 33A & 45.*

*Companies – Hotel company – Restaurant company not wholly owned by hotel – Trade union has no right to insist on single collective agreement negotiation.*

The National Union of Hotel, Bar & Restaurant Workers (the Union) made a proposal to Hotel Malaya Sendirian Berhad (the Hotel Company) for a new collective agreement and suggested that there should be a single collective agreement between the Union on the one hand and the Hotel Company and the Kuala Lumpur Restaurant Sendirian Berhad (the Restaurant Company) on the other. Therefore, the Union invited the Hotel Company to enter into negotiation for a single collective agreement on that basis. The Hotel Company denied that it was the employer of the workers in the restaurant of the Restaurant Company, and it did not agree to a single collective agreement and refused to negotiate unless the Union agreed to separate negotiations on the basis of separate collective agreements, one in respect of the Hotel Company and another in respect of the Restaurant Company. The Union felt that the parties had reached a deadlock and therefore decided to commence strike action against the Hotel Company. The workers of the Hotel Company went on strike on August 1, 1979.

Upon the commencement of the strike the Hotel Company referred the matter to the Minister of Labour and Manpower forthwith. On August 9, 1979, the Hotel Company wrote to its workers on strike terminating their services as from that date on the ground of illegal strike.

On August 18, 1979, the Minister through Ketua Setiausaha of his Ministry referred the dispute to the Industrial Court under section 26(2) of the Industrial Relations Act (the Act). After hearing the parties the Industrial Court made an award in favour of the Hotel Company. Subsequently, on the application of the Union the Industrial Court referred certain questions of law to the High Court under section 33A of the Act.

**Held:** (1) the strike was illegal;

(2) the Industrial Court should have considered and decided on the question whether the Hotel Company was the employer of the workers in the restaurant of the Restaurant Company because the question was relevant. In the present case the Hotel Company was not the employer;

(3) the Industrial Court had erred in law and made a jurisdictional error in failing to consider and decide on the question whether there should be a single collective agreement. The decision should be that there should be separate collective agreements and hence separate negotiations;

(4) confirming the Industrial Court's decision, the Hotel Company was justified in terminating the services of the workers on strike.

*Cases referred to:*

(1) *Hotel Jaya Puri Berhad* v. *National Union of Hotel, Bar & Restaurant Workers & Anor.* [1980] 1 M.L.J. 109.
(2) *Harold Holdsworth & Co. (Wakefield) Ltd.* v. *Caddies* [1955] 1 All E.R. 725.
(3) *Littlewoods Mail Order Stores Ltd.* v. *McGregor (Inspector of Taxes)* [1969] 3 All E.R. 855.
(4) *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852.
(5) *Amalgamated Investment & Property Co. Ltd. (In Liquidation)* v. *Texas Commerce International Bank Ltd.* [1981] 3 W.L.R. 565.

APPEAL FROM INDUSTRIAL COURT.

*T. Thomas* for the applicant.

*V.K. Palasuntharam* (*Eugene Lye* with him) for the respondent.

*Cur. Adv. Vult.*

**Wan Hamzah S.C.J.**: The National Union of Hotel, Bar & Restaurant Workers (the Union) made a proposal to Hotel Malaya Sendirian Berhad (the Hotel Company) for a new collective agreement and suggested that there should be a single collective agreement between the Union on the one hand and the Hotel Company and the Kuala Lumpur Restaurant Sendirian Berhad (the Restaurant Company) on the other. It was contended by the Union that the Hotel Company was the real employer of the workers working with the Restaurant Company and there was sufficient functional integrality and unity of establishment between the Hotel Company and the Restaurant Company. Therefore the Union invited the Hotel Company to enter into negotiation for a single collective agreement on that basis. The Hotel Company denied that it was the employer of the workers in the restaurant of the Restaurant Company, and it did not agree to a single collective agreement and refused to negotiate unless the Union agreed to separate negotiations on the basis of separate collective agreements, one in respect of the Hotel Company and another in respect of the Restaurant Company. The Union felt that the parties had reached a deadlock and therefore decided to commence strike action against the Hotel Company with effect from August 1, 1979, at 3.00 p.m. On July 28, 1979, the Hotel Company wrote a letter to Pengarah Hal Ehwal Perhubungan Perusahaan (Selangor and Penang) and informed him about the disagreement. A copy of the letter was extended to the Union. Eighty-nine workers of the Hotel Company commenced strike action on August 1, 1979. Upon the commencement of the strike the Hotel Company referred the matter to the Minister of Labour and Manpower forthwith. On August 9, 1979, the Hotel Company wrote to its workers on strike terminating their services as from that date on the ground of illegal strike. On August 17, 1979, the Minister through the Ketua Setiausaha of his Ministry referred the dispute to the Industrial Court under section 26(2) of the Industrial Relations Act. After hearing the parties the Industrial Court made an award in favour of the Hotel Company. In the award the Industrial Court stated the grounds for its decision as follows:

"The Court finds it not relevant to decide, for the purpose of the first issue, whether or not the Hotel is the employer of the Restaurant's employees by 'functional integrality', because of the fact that the Union had proceeded to resort to picketing and strike on its firm conviction that the Hotel was the employer, without waiting for a Court's decision. To go on strike must always be the last resort, never hastily done. A strike must be both legal and justified, as was found in the *Southeast Asia Firebricks Case No. 1 of 1974 in Award No. 39/74.* The Union's Counsel submits that the question of the strike being justified or not is immaterial. The Court, with great deference, does not agree. It is a question of mixed fact and law. Upon the Union's failure to re-commence negotiations for a fresh Collective Agreement because of its demand to deal with the Hotel together with the Restaurant as one establishment, the Union should have been patient to request the Ministry for reference on its own, before taking industrial action, at first picketing and later going on strike. To press home such a demand on the Hotel before actually commencing negotiations, in the considered view of the Court, is unjustified from the standpoint of fairness and reasonableness. Social justice is founded on fairness and reasonableness. Nothing can be said positively against the conduct of the Hotel's employees during their picketing and strike. If such a reference had been made by the Union on its own, the negotiations would have commenced on all proposals, leaving out the proposal in Article 1 for the Court to decide whether or not to combine the Hotel with the Restaurant as one Party to the new Collective Agreement, put forward by the Union. Where a strike is legal but unjustified as here, there can be no remedy awarded. Having come to the conclusion that the strike was unjustified, the Court finds on the second issue that the absence from duty by the Hotel's employees after August 1, 1979, for more than 2 days was deemed by the Hotel's management as a fundamental breach of contractual employment without just cause or reasonable excuse and that the management was justified in acting under section 15(2) of the Employment Ordinance 1955 to terminate their services with effect from August 9, 1979."

Subsequently on the application of the Union the

Industrial Court referred the following questions of law to the High Court under section 33A of the Act:

"(i) Whether in the context of Malaysian laws there is such a strike as a 'justified' strike or whether a strike is merely not illegal.

(ii) Whether the Industrial Court was wrong in law in deciding that since the strike was 'unjustified' though 'not illegal' the absence from duty by the Hotel's employees after August 1, 1979, for more than 2 days was deemed by the Hotel's management as a fundamental breach of contractual employment without just cause or reasonable excuse and that in the circumstances the Hotel's Management was justified in acting under section 15(2) of the Employment Ordinance, 1955 to terminate the services of the employees of the Hotel w.e.f. August 9, 1979.

(iii) Whether the Industrial Court was right in law to state that a strike should be both legal and justified to entitle the workers for any remedy and thus deny the employees of Hotel Malaya any remedy because it found the strike not justified after finding that the said strike was not illegal.

(iv) Whether the Industrial Court (was right in) stating that it was not relevant for it to decide whether or not the Hotel is the employer of the employees of Kuala Lumpur Restaurant by functional integrality because of the fact that the union had proceeded to resort to picketting and strike thus deciding on its own that the Hotel was the employer of the employees of Kuala Lumpur Restaurant.

(v) Whether the Industrial Court erred in law and also committed a jurisdictional error in that after defining as one of the two issues to be resolved by the Court i.e. whether there should be one Collective Agreement to cover both employees of the Hotel and the Restaurant or whether there should be two separate Collective Agreements declined to make a finding on the very same 'first' issue."

With regard to question of law (iv) I add the words "was right in" because I believe that those words were inadvertently omitted. Without the added words the question would not make sense. In view of the reference of the questions of law the High Court has to determine the referred questions as if the reference were an appeal to the High Court against the award, and may confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary [section 33A(5) of the Act].

In the Statement of Case filed in the Industrial Court by the Union the Industrial Court was asked to order reinstatement of the workers to their former appointments. Whether the workers should be reinstated depends on whether the termination of their services was valid. Whether the termination was valid depends on whether the strike was legal. Whether the strike was legal depends on whether the Union had the right to insist on a single collective agreement. Whether the Union had the right to insist on a single collective agreement depends on whether the Hotel Company was the employer of the workers working with the Restaurant Company. In the case of *Hotel Jaya Puri Berhad* v. *National Union of Hotel, Bar & Restaurant Workers and Another*[1] a similar question arose, *i.e.* whether the workers working in the restaurant of the Jaya Puri Chinese Garden Restaurant Sendirian Berhad were employed by Hotel Jaya Puri Berhad. The following is an extract from the judgment of Salleh Abas F.J. (as he then was) dealing with that question:

"The President (of the Industrial Court) made a number of findings as follows:

(1) The Hotel and the Restaurant were inter-dependent.

(2) There was a functional integrality and unity of establishment between the Hotel and the Restaurant. In other words, functionally the Hotel and the Restaurant are in fact one integral whole and management-wise they also constitute a single unit. Dato N.A. Kularajah who is the Managing Director for both the Hotel and the Restaurant, although later he became only the Director of the Hotel, had the ultimate authority over the employees working for the Restaurant.

(3) A number of senior officers such as the Secretary, Personnel Manager and Assistant Manager were common both to the Hotel and the Restaurant.

(4) 32 employees whose letters of appointment are those in Bundles A and B were appointed by the Hotel although 8 employees whose letters of appointment are in Bundle C were appointed by the Restaurant.

Thus taking all these findings into consideration, the President said: 'in the light of all the above, the (Industrial) Court concludes that in the peculiar circumstances of this dispute the Hotel is the employer of the workers in question.' I am now being asked by the learned counsel to interfere with the award on the ground that this finding is an error in law sufficient to quash the award. For my part, I wish to approach the problem from the point of view whether this finding i.e. the finding that the Hotel is an employer, is unreasonable and cannot be supported by either law or facts ..... In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account."

In the present case I do not find evidence to support a finding of facts similar to the facts found by the President of the Industrial Court in the Jaya Puri case as stated above, except that Mr. K.H. Goh the General Manager of the Hotel Company,

was also the General Manager of the Restaurant Company, but there was a separate manager for the Restaurant Company in charge of the day-to-day running of the restaurant. In my opinion this fact alone was not sufficient to support a finding that the Hotel Company was employer of the workers of the Restaurant Company. Besides, the Restaurant Company was not a wholly-owned subsidiary of the Hotel Company. The Hotel Company held 90.75% only of the paid up capital of the Restaurant Company, and this was strong evidence of two different entities. Counsel for the Union cited the following decided cases to support the contention that employees of the Restaurant Company were employees of the Hotel Company: *Harold Holdsworth & Co. (Wakefield), Ltd.* v. *Caddies,*[2] *Littlewoods Mail Order Stores, Ltd.* v. *McGregor (Inspector of Taxes),*[3] *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets Londong Borough Council,*[4] and *Amalgamated Investment & Property Co. Ltd. (In Liquidation)* v. *Texas Commerce International Bank Ltd.*[5]

I do not intend to go into the facts of the above cited cases in detail. I would like only to point out that all of the above cases were cases of wholly-owned subsidiary companies, and on that account in my opinion it is not safe to apply the decisions in the above cases to the present case in which the Restaurant Company was not a wholly-owned subsidiary of the Hotel Company. In the result the Hotel Company cannot in my judgment be taken as employer of the workers of the Restaurant Company, and therefore the Union had no legal right to insist on negotiation for a single collective agreement. The strike action was not taken for a legal purpose. It was taken in furtherance of a single collective agreement which the Union had no legal right to have. Therefore the strike was illegal. The Union could have gone to court to determine the issue of collective agreement, instead of resorting to strike.

There was another reason why the strike was illegal. The relevant part of section 45(1) of the Act reads –

"A strike or a lock-out shall be deemed to be illegal if –

(b) it has any other object than the furtherance of a trade dispute –

(i) between the workmen on strike and their employer."

The workers who went on strike and whose employments were terminated were members of the Union and employees of the Hotel Company and therefore the dispute in this case was a dispute "between the workmen on strike and their employer," but the question is whether the dispute was a trade dispute. "Trade dispute" is defined in section 2 of the Act to mean any dispute between an employer and his workmen which is connected with –

(a) the employment or non-employment, or

(b) the terms of employment, or

(c) the conditions of work

of any such workmen. It cannot be said that the dispute leading to the strike was a dispute connected with the terms of employment or the conditions of work, because there was no negotiation yet on the terms and conditions of employment and before such negotiation took place it cannot be said that there was a dispute or agreement on any of the terms of employment or conditions of work. Nor can it be said that the dispute leading to the strike was a dispute connected with non-employment because there was no question of non-employment then. The question is whether the dispute was a dispute connected with the employment of the workmen. If, for example, there was a protest by a trade union against the employer for employing some of its members in jobs inferior in status to those promised earlier by the employer, it can be said without difficulty that the dispute between the trade union and the employer was a dispute connected with the employment of the workmen. I do not think that a dispute as to whether there should be a single collective agreement was a dispute connected with employment although the collective agreement to be negotiated would be an agreement dealing with matters relating to employment. The connection between the dispute and employment was too remote. In my opinion the connection between a dispute and employment must be a direct connection in order to qualify the dispute as a trade dispute, because if this was not so workers would be able to take strike action in any dispute on the flimsy excuse that it was connected with employment, bearing in mind that workers are employed and therefore connected with employment. In this case it would be right to say that the dispute leading to the strike was connected with collective agreement rather than with employment.

Under the circumstances of this case I hold that when the strike action was commenced there was no trade dispute and therefore the strike

action was illegal and the Hotel Company was justified in terminating the services of the workers on strike. When the services were terminated there was a trade dispute arising, connected with non-employment *i.e.* termination of services, and the Minister properly referred the trade dispute to the Industrial Court. Therefore the answers to the questions of law referred to the High Court are as follows:

*Question (i)*
Once it was shown that a strike was legal, the workmen should not be required further to show that the strike was justified. All legal strikes should be taken as justified and all illegal strikes as unjustified. Under the circumstances of this case the strike was illegal, as shown above.

*Question (ii)*
The Hotel Company was justified in terminating the services of the workers on strike because the strike was illegal.

*Question (iii)*
See the answer to question (i).

*Question (iv)*
The Industrial Court should have considered and decided on the question whether the Hotel Company was the employer of the workers in the restaurant of the Restaurant Company because the question was relevant. As shown above, the Hotel Company was not their employer.

*Question (v)*
The Industrial Court had erred in law and made a jurisdictional error in failing to consider and decide on the question whether there should be a single collective agreement. The decision should be that there should be separate collective agreements and hence separate negotiations, as shown above.

I confirm the Industrial Court's decision that the Hotel Company was justified in terminating the services of the workers on strike.

*Order accordingly.*

Solicitors: *Skrine & Co.; Eugene Lye & Co.*

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## NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS v. KUALA LUMPUR RESTAURANT SDN. BHD.

**[A.C.J. (Wan Hamzah S.C.J.) October 11, 1985]**

**[Kuala Lumpur – Civil Appeal No. 33 of 1983]**

*Industrial Relations – Termination of workers' services – Whether termination valid – Restaurant closed owing to bad business – Whether closure bona fide – Whether Hotel Company or Restaurant Company is the real employer of the workers – Industrial Relations Act, 1967.*

Pursuant to section 26 of the Industrial Relations Act the Minister referred to the Industrial Court a dispute between the National Union of Hotel, Bar & Restaurant Workers (the Union) and Kuala Lumpur Restaurant Sendirian Berhad (the Restaurant Company). On March 2, 1979, the Union submitted proposal for new single collective agreement for both the Hotel Company and the Restaurant Company. The parties met but were unable to reach agreement on the proposal. The Hotel Company wanted separate negotiations and separate collective agreements.

On July 28, 1979, the Restaurant Company wrote to 53 workers in the restaurant stating that owing to heavy losses it had to cease business. By the same letters the services of the workers were terminated as from July 30, 1979.

The Union contended that the closure of the restaurant was not genuine and it was not done for business reasons but as a retaliatory measure against the Union (for insisting on a single collective agreement). In reply, the Restaurant Company argued that the employment of the workers was terminated upon the closure of the restaurant owing to losses sustained in the operation of the restaurant, and it was denied that the termination of employment was done as a retaliation against the Union.

The Industrial Court held that at the time of the closure of the restaurant the Management was in financial difficulties and that the closure was *bona fide* and justified, and it held that the services of the workers were properly and legally terminated. The Industrial Court also held that the question of whether the Hotel Company was the employer of the workers was not relevant, and it refrained from making a decision on the question. On the application of the Union the Industrial Court referred certain question of law to the High Court for decision.

**Held**: (1) the Industrial Court was correct in stating that it found no relevance to decide whether or not the Hotel Company was the employer of the workers of the restaurant since it found that the closure was due to business losses;

(2) the Industrial Court did not commit jurisdictional error in declining to decide whether or not the Hotel Company was the employer of the workers of the restaurant.

APPEAL FROM INDUSTRIAL COURT.

*T. Thomas* for the applicant.

*V. K. Palasuntharam* (*Eugene Lye* with him) for the respondent.

*Cur. Adv. Vult.*